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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

LONNIE JAMES BALL, Alias L. J. BALL,
Petitioner,

vs.

THE STATE OF ALABAMA,
Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States of America:

The petitioner, Lonnie James Ball, alias L. J. Ball, respectfully shows to this Honorable Court:

STATEMENT OF MATTER INVOLVED.

Your petitioner, a male negro citizen of the United States and a resident of the State of Alabama, was indicted during the spring term of 1948 by the Grand Jury of Calhoun County, Alabama. The indictment charged petitioner with first degree murder (Rec. p. 1), and by operation of

law also included the lesser offenses of murder in the second degree, manslaughter in the first degree, and manslaughter in the second degree—**Title 15, Sec. 323, Alabama Code of 1940.** On May 22, 1948, petitioner was arraigned and pleas of not guilty and of not guilty by reason of insanity were interposed (Rec. p. 3). There was no order entered by the court of the appointment of counsel to represent petitioner upon the arraignment or upon the trial. On June 7, 1948, a purported motion to quash the venire of the petit jury was filed in said cause (Rec. p. 3), which said motion was stricken upon motion of the Solicitor for the State of Alabama. On said date petitioner was put to trial upon the issues presented by the indictment and the pleas of not guilty and of not guilty by reason of insanity theretofore entered in his behalf. He was thereupon convicted of murder in the first degree and his punishment was fixed at death (Rec. p. 16). Sentence was pronounced on June 11, 1948. A motion for a new trial was timely filed in petitioner's behalf on June 11, 1948, which said motion for a new trial was duly continued by the court from time to time and as amended was overruled September 3, 1948, to which ruling petitioner duly excepted (Rec. p. 761). An appeal to the Supreme Court of Alabama was timely taken (Rec. p. 262). **Title 15, Sec. 282 (2), 1947, Cum. Suppl. to Vol. 4, 1940, Code of Alabama.** On the 30th day of June, 1949, the Supreme Court of Alabama affirmed the judgment and sentence rendered in said cause (Rec. p. 274). Timely application was duly made to the Supreme Court of Alabama for a rehearing in said cause and to set aside and hold for naught the judgment rendered in said cause on June 30, 1949, by the Supreme Court of Alabama, affirming the conviction and judgment rendered in the Circuit Court of Calhoun County, Alabama, in said cause (Rec. p. 276). Said application for rehearing was denied by the Supreme Court of Alabama on the 17th day of November, 1949 (Rec. p. 277).

There was evidence adduced upon the trial of your petitioner which would have justified an unbiased jury in finding petitioner intoxicated to such a degree at the time of the commission of the homicide that he was utterly incapable of any rational action and hence utterly incapable of forming the specific intent essential to a malicious killing and was sufficient to negative the premeditation and deliberation essential to murder in the first degree. **Ivory v. State,** 186 So. 460, 237 Ala. 344 (Rec. p. 67); (Rec. pp. 75, 76, 78); (Rec. pp. 81, 82); (Rec. pp. 85, 86); (Rec. pp. 89, 90, 91).

The evidence for the State tended to show that the homicide occurred in the City of Oxford on the premises of a combination service station and store between the hours of 3:30 and 4:30 p. m. (Rec. p. 19); that the deceased, who was Chief of Police for the City of Oxford, came to the scene of the homicide, accompanied by another policeman, a Mr. Billingsley, after having been summoned there because of a disturbance created by your petitioner, who was cursing and using loud language in the presence of white persons and other negroes who had accompanied your petitioner to the scene, and who were unable to control the wild and uninhibited conduct of petitioner (Rec. p. 122); that the two officers arrested your petitioner and placed him in the police car unarmed, whereupon your petitioner sprang from the car, took hold of Officer Billingsley; that Officer Billingsley and petitioner both fell to the ground, during which fall Officer Billingsley's pistol was fired (Rec. p. 27) and continued firing in rapid succession five times; that the deceased, Chief of Police Sparks, fell after the first shot was fired (Rec. p. 27). There was no evidence tending to prove any ill will existing between the deceased and petitioner prior to the homicide. On the other hand, petitioner testified that he and the deceased were friends (Rec. p. 90).

On the hearing of the motion for a new trial the Honorable Richard B. Emerson, a lawyer, testified, upon being called by petitioner, that he was in the court room on the day of arraignment of petitioner and was asked by Judge Field to stand by petitioner upon arraignment, which he did (Rec. p. 138). Witness also testified that he had not previously been requested to be present at arraignment of petitioner, had never seen petitioner prior to arraignment, did not discuss the case with petitioner, did not introduce himself to petitioner and never conferred with or had any contact at all with petitioner, either before or after the arraignment, and did not aid in the preparation of petitioner's case in any way (Rec. p. 139). Mr. Emerson also testified that he advised the court at the time of petitioner's arraignment that he was not in a position to represent and defend petitioner (Rec. p. 140). Pleas of not guilty and of not guilty by reason of insanity were interposed in behalf of petitioner upon the arraignment.

There was no plea in abatement attacking the indictment on the ground that members of the petitioner's race were systematically and intentionally excluded from serving on the Grand Jury which indicted petitioner, and had been so excluded for a period of many years prior to petitioner being indicted in the instant case. **Code of Alabama 1940, Title 15, Section 278.** Petitioner's substantial right was herein waived. **Title 15, Section 279, Code of Alabama 1940.**

The judge presiding and hearing the motion for new trial (the trial judge having previously died) took judicial notice of the official United States Census for Alabama and of the fact that the last United States Census for Calhoun County, Alabama, designated a population in that county of slightly more than twenty per cent colored persons, some 12,900 odd negroes and about 50,275 whites (Rec.

p. 174). Although a subpoena duces tecum was duly executed calling for the jury roll of said county, the Judge sustained the objections of the Solicitor for the State to its production in court as evidence on the motion for a new trial. The evidence further disclosed that during the entire period of time the Clerk of the Jury Commission of Calhoun County, Alabama, had served, a period of more than five years, the jury box had not been emptied and refilled, although it had to some extent been replenished from time to time (Rec. p. 170). There were no negroes summoned to serve as Grand Jurors at the time petitioner was indicted. The Grand Jury which indicted petitioner was selected on April 26, 1948, and thirty persons were summoned (Rec. pp. 141, 143). One hundred names were drawn to constitute the venire from which the petit jury which tried petitioner on June 7 and 8, 1949, was selected and no negroes were in that number (Rec. p. 145). It was disclosed that one negro had served on the Grand Jury during the five years next preceding the indictment of petitioner (Rec. p. 153), and that approximately one hundred and twenty persons were called for Grand Jury service in Calhoun County each year (Rec. p. 155); that only one negro had been called to serve on the petit jury during the said five-year period (Rec. p. 153), and that around four to five hundred jurors are summoned for petit jury service each year.

One member of the Jury Commission testified that he had put approximately four hundred names in the box and that there were among that number only about five negroes; that of the twenty-four hundred or twenty-five hundred names in the jury box (Rec. p. 185) there were only between twenty-five and thirty who were negroes (Rec. pp. 186, 187). Another member of the Jury Commission testified that since he had served on the Jury Commission approximately six hundred names had been

put in the box and among them were only eight negroes (Rec. pp. 193, 195). The remaining member of the Jury Commission testified he had submitted approximately four hundred names to be placed in the jury box (Rec. p. 198), and that in that number there were only about eight negroes (Rec. p. 199).

Petitioner's present counsel, not representing petitioner upon the trial of this case, participated in a judicial hearing presided over by Judge Field, the trial judge, wherein Mr. Joe Cockrell, the Circuit Solicitor for the State of Alabama, and Mr. Ben Dorman, the County Solicitor for Calhoun County, Alabama, represented the State of Alabama. The hearing was held on the evening of May 31, 1948, and had been arranged by Judge Field the week prior to that date. During the hearing petitioner's present counsel requested a continuance of the case for a reasonable time, approximately two weeks. Petitioner's counsel stated as their reason for making this request that they had been consulted about employment in petitioner's case by friends interested in petitioner, but that no agreement had been reached in that regard. However, petitioner's counsel stated that they had been informed and believed that petitioner had been connected with the Armed Forces of the United States Government in the South Pacific Theater of War for approximately four years, and according to the information received was suffering from some malady or illness contracted during that service in the army, and that they believed it necessary to a proper defense of petitioner that an investigation be conducted in this connection which would be impossible in the short time before the trial date (Rec. pp. 245-247). Judge Field, the trial judge, thereupon said to Mr. Joe Cockrell, the Circuit Solicitor for the State of Alabama, "Well, Joe, what do you say?" To which question the Solicitor replied, "Well, Judge, I feel that the case ought to go to trial"; at which

point the County Solicitor stated, "Judge, if this case is continued there will never be another negro that kills a white man that will go to trial in Calhoun County." Whereupon petitioner's present counsel stated to the trial judge that if that was the state of mind of the people of Calhoun County, then obviously the case should not go to trial. Whereupon Judge Field stated: "I am going to put him to trial," and further stated: "Roderick, if I pass this case the people of this county will storm the jail" (Rec. p. 247). The continuance was denied and petitioner's present counsel did not undertake the defense of your petitioner upon the trial of his case.

No entry was made on the records of the Circuit Court of Calhoun County, Alabama, of the appointment of counsel to represent petitioner upon the trial of this case in any stage thereof. On the hearing of the motion for a new trial it was disclosed that your petitioner's trial attorney was selected by the trial judge on the morning of June 3, 1948, around 7:00 or 7:30 o'clock, a. m., as he was dining with his wife in the dining room of the Noble Arms Apartment in Anniston, Alabama, at which time your petitioner's trial judge approached the attorney who represented your petitioner upon the trial of his case before the petit jury, and invited him to another table and there requested him to represent petitioner at his trial, to help him (Judge Field, your petitioner's trial Judge) out in a difficulty (Rec. p. 157). Your petitioner's trial attorney thereupon stated to Judge Field that it was impossible for him to prepare the case on such short notice (Rec. p. 157). Your petitioner's trial attorney, on the hearing of the motion for a new trial, testified that during the past fifteen or twenty years his practice had been practically of a civil nature.

According to the evidence presented by the petitioner on the hearing of the motion for a new trial, he was denied the

right to consult with any one, including members of his family, at any time prior to his arraignment, and was not allowed to consult or advise with members of his family or any one else, with one exception, an occasion when his trial attorney came to the jail and conferred with him for approximately thirty minutes or forty-five minutes (Rec. p. 227). Petitioner is an uneducated laborer without any knowledge or experience concerning court proceedings (Rec. p. 228). No motion for a change of venue was filed on behalf of petitioner. No plea in abatement was filed properly raising objections to the indictment on the ground that members of petitioner's race had been systematically and intentionally excluded from serving upon the Grand Jury which indicted your petitioner and had been so systematically and intentionally excluded from Grand Juries in Calhoun County for a long period of time.

Your petitioner takes the position that had counsel, "standing by" your petitioner upon the arraignment, interposed a plea in abatement prior to his interposing pleas of not guilty and of not guilty by reason of insanity, such plea in abatement would probably have been sustained by the trial court, or would have constituted error to a reversal of this cause, and the failure of counsel "standing by" petitioner upon his arraignment to interpose such a plea in abatement prior to waiving this substantial right of your petitioner by filing pleas in bar, was the result of the empty formality of the Court in designating counsel to "stand by" your petitioner upon the arraignment, without placing any definite responsibility upon such attorney to represent your petitioner upon the arraignment (Rec. pp. 137-141).

Your petitioner takes the position that had counsel designated by the trial court to "stand by" your petitioner upon his arraignment, filed a proper motion for a change of venue, such motion would probably have been sustained

and your petitioner would probably have been afforded a trial by a jury free of the hostility, prejudice and bias admitted by the trial judge to exist, or the failure of the trial court to have granted such motion for a change of venue would have been error to a reversal of this cause.

Your petitioner takes the position that the necessity of counsel was so vital and imperative upon the arraignment that the failure of the trial court to make an effective appointment of counsel was a denial of due process and the equal protection of the laws within the meaning of the Fourteenth Amendment to the Federal Constitution. Your petitioner further takes the position that the action of the trial court in knowingly forcing petitioner to trial in an atmosphere of hostility, prejudice and resentment sufficient to coerce the verdict of the jury which the court itself recognized as existing, was a denial of due process and the equal protection of the laws within the meaning of the Fourteenth Amendment to the Federal Constitution. Your petitioner also takes the position that he was denied due process of law and the equal protection of the laws within the meaning of the Fourteenth Amendment to the Federal Constitution in that he was denied the right to effective and substantial aid of counsel upon the trial of his case before the petit jury of Calhoun County, Alabama, which rendered a verdict of guilty against your petitioner and fixed his punishment at death by electrocution.

THIS COURT HAS JURISDICTION.

The Act of Congress of June 25, 1948, **Title 28, United States Code of Judiciary and Judicial Procedure, Approved June 28, 1948, Sec. 1257 (3)**, authorizes review by the Supreme Court of the United States by certiorari in any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state,

"where any title, right, privilege or immunity is specially set up or claimed under the constitution * * *."

Supreme Court Rule 38, Sec. 5 (b) provides for review by the Supreme Court of the United States,

"where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with the applicable decisions of this court."

Where the denial of the constitutional right to assistance of counsel is asserted, its peculiar sacredness demands that the United States Supreme Court scrupulously review the Record. **Avery v. State of Alabama,** 60 Sup. Ct. 321, 308 U. S. 444, 84 L. Ed. 377; **Powell v. State of Alabama,** 77 L. Ed. 158, 53 Sup. Ct. 55, 287 U. S. 45, 84 A. L. R. 527.

Where a right, title, claim or immunity is claimed under the Constitution of the United States, the Supreme Court of the United States must inquire not merely whether that right, title, claim or immunity has been expressly denied, but also whether they have been denied in substance and effect and it must review independently both legal issues and the factual matters with which they are commingled. **Oyama v. State of California** (1948), 68 Sup. Ct. 269, 322 U. S. 633, 92 L. Ed. 249; **Norris v. State of Alabama** (1935), 55 Sup. Ct. 579, 294 U. S. 587, 79 L. Ed. 1074; **Patterson v. State of Alabama** (1935), 55 Sup. Ct. 575, 294 U. S. 600, 79 L. Ed. 1082; **U. S. v. Pink** (1942), 62 Sup. Ct. 552, 315 U. S. 203, 86 L. Ed. 796.

THE QUESTIONS PRESENTED.

1. The Supreme Court of the State of Alabama has, by its decision, affirmed a judgment of conviction in a capital case rendered as the product of a trial in which this peti-

tioner was denied due process of law and equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States in that the trial was not conducted according to the due cause of regular procedure provided by law in the State of Alabama, this petitioner being denied the effective and substantial aid of counsel upon his arraignment.

2. The Supreme Court of Alabama has by its decision affirmed a judgment by conviction in a capital case rendered as the product of a trial wherein this petitioner was denied due process of law and equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States in that he was forced to trial by his trial judge in an atmosphere of local public opinion, known to exist by the trial judge, which was so hostile and prejudicial, biased and inflamed that your petitioner probably could not have had a fair, impartial and deliberate trial.

3. The Supreme Court of Alabama has, by its decision, affirmed a judgment of conviction in a capital case rendered as the product of a trial wherein this petitioner was denied due process of law and the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States specifically as follows:

(a) He was not given a fair, impartial and deliberate trial.

(b) He was denied the right of counsel with the accustomed incidents of consultation and opportunity of preparation for trial.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Supreme Court of Alabama, in said case, decided the Federal question of substance as to whether or not this petitioner was denied the effective assistance of counsel upon his arraignment by holding that the trial court's action in designating a lawyer present in the court room upon the day of petitioner's arraignment to "stand by," who was not familiar with petitioner's case and who was not expected to investigate petitioner's case, and did not investigate petitioner's case, and who did not consult with petitioner, or introduce himself to petitioner prior to interposing pleas in bar in petitioner's case, and thereby waiving substantial rights of your petitioner, and upon whom no responsibility was placed by the trial court in connection with the defense of your petitioner, was the effective and substantial assistance of counsel within the meaning of due process of law and equal protection of the laws provided by the Fourteenth Amendment to the Constitution of the United States, which decision is not in accord with the decisions of this Court, including the case of **Powell v. State of Alabama**, 77 L. Ed. 158, 53 Sup. Ct. 55, 287 U. S. 45, 84 A. L. R. 527.

2. The Supreme Court of Alabama, in said case, decided a Federal question of substance as to whether or not this petitioner was denied due process of law and the equal protection of the laws against this petitioner by holding that this petitioner was not denied a trial by a fair and impartial, or an unbiased and unprejudiced jury by being forced to trial by the trial judge in an atmosphere of hostility, resentment and prejudice so strong and heated that the trial judge himself admitted, one week prior to the trial, that the people of Calhoun County would storm the jail if petitioner's case was passed in order for further

investigations to be conducted on behalf of petitioner, which decision is probably not in accord with applicable decisions of this Court, including **Patton v. United States,** 281 U. S. 276, 50 Sup. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263.

3. The Supreme Court of Alabama is the highest court of the State of Alabama and petitioner has exhausted his remedy in that Court; that the judgment appealed from is a final judgment and presents federal questions of substance and importance worthy of the consideration of the Supreme Court of the United States.

A copy of the entire record in this case, certified to be correct by the Clerk of the Supreme Court of Alabama, is presented to this Court and filed herewith as an exhibit hereto.

PRAYER FOR WRIT.

Wherefore, your petitioner doth pray that a writ of certiorari issue to the Supreme Court of Alabama to the end that the errors aforesaid may be corrected.

LONNIE JAMES BALL, alias
L. J. BALL,

By.....
G. ERNEST JONES,
Of Birmingham, Alabama,
Counsel for Petitioner.

RODERICK BEDDOW,
G. ERNEST JONES, JR.,
Of Birmingham, Alabama,
Of Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION BELOW.

The opinion of the Supreme Court of Alabama is reported in 42 Southern Reporter (2d) 626. The opinion is also contained in the Record (Rec. pp. 267-273).

JURISDICTION.

1. The date of the judgment sought to be reviewed is January 30, 1949. Petition for rehearing was denied by the Supreme Court of Alabama on November 17, 1949 (Rec. p. 277).

2. The statutory provision which is believed to sustain the jurisdiction of this Court in title 28, U. S. Code, Judiciary and Judicial Procedure, approved January 28, 1948, Sec. 1257 (3), 28 U. S. C. A., Section 1257 (3).

3. Petitioner earnestly insists that he is not guilty of the offense for the commission of which he was convicted. He insists that his conviction was probably the result of his having been denied due process of law and equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States in the following respects: Your petitioner is an ignorant and uneducated negro laborer, without any knowledge concerning court procedure (Rec. p. 228). He was brought into court on May 22, 1948, for arraignment and had no counsel to represent him. He had been continuously confined in the Calhoun County jail in Anniston, Alabama, since May 7, 1948, the date of the commission of the alleged offense, without being permitted to consult with anyone, includ-

ing members of his own family (Rec. p. 227). Under the law of Alabama he was required to plead to the indictment or the Court would have entered a plea of "not guilty" for him (Title 15, Section 276, Alabama Code of 1940, Appendix A). Without anyone advising your petitioner and without his having any knowledge of the proceedings taking place, the trial judge told a lawyer, who happened to be present in the court room, to "stand by" your petitioner and enter pleas suggested by the Court in petitioner's behalf, namely, pleas of "not guilty" and "not guilty by reason of insanity," which pleas were entered in behalf of your petitioner. The lawyer so casually designated by the trial judge to enter pleas in petitioner's behalf upon his arraignment did not introduce himself to petitioner; did not converse with petitioner or in any way consult with and advise petitioner of the effect of the pleas entered in his behalf, or suggest to your petitioner any other pleas which might be entered in his behalf, and did not request petitioner's consent to the pleas so entered in behalf of your petitioner upon his arraignment. Petitioner was not informed by the Court, or the lawyer designated by the Court to "stand by" him upon his arraignment, that his rights were being waived and that he could not later object to the indictment for the reason that members of his race were systematically and intentionally excluded from the Grand Jury which returned the indictment against him, and had been so excluded from the Grand Juries of Calhoun County, Alabama, for a long period of time (Rec. pp. 138-140) (Title 15, Sec. 278, Alabama Code of 1940, Appendix B). The Court did not place such importance upon the designation of counsel to "stand by" petitioner upon his arraignment as to enter such designation upon the Minutes of said Court as a formal appointment by said Court, even though the Circuit Court of Calhoun County, Alabama, is a Court of Record. Petitioner was entitled to the appointment of counsel to represent him upon his ar-

raignment (Title 15, Sec. 318, 1947 Cumulative Supplement to Volume 4 of the 1940 Code of Alabama, Appendix C). Thus your petitioner was denied the substantial and effective representation by counsel at an important stage of his trial. He thereby suffered grievous injuries.

Your petitioner was brought to trial before a petit jury of Calhoun County, Alabama, on June 7, 1948. On June 3, 1948, petitioner's trial judge casually requested the Honorable Hugh Walker, an attorney whose practice had consisted principally of a civil nature for a great many years, to represent your petitioner upon his trial to help him, the trial judge, out in a difficulty (Rec. p. 157). This request was made at the breakfast hour in the Noble Arms Apartments in the City of Anniston, Calhoun County, Alabama, at a time when the Honorable Hugh Walker was having breakfast. The Honorable Hugh Walker reluctantly accepted your petitioner's defense, stating at the time that he did not feel he could prepare the case in so short a time. No formal order of appointment of counsel to represent petitioner before the petit jury of Calhoun County was entered of record in the Circuit Court of Calhoun County, Alabama. The Honorable Hugh Walker consulted with your petitioner on only one occasion for about thirty minutes prior to his trial before a petit jury (Rec. p. 227).

Neither of the attorneys designated by the trial court to attend your petitioner upon his arraignment and upon his trial before a petit jury, filed a motion for a continuance, or a motion for a change of venue, or took any necessary measures to protect your petitioner from the biased, hostile and inflamed sentiments existing in Calhoun County at the time of his trial before a petit jury. Public sentiment was so inflamed against your petitioner that the trial judge himself stated that the people of Calhoun County would storm the jail if petitioner was not brought to trial before

a jury on June 7, 1948, and the county attorney for Calhoun County stated that there never would be another negro tried in Calhoun County if petitioner was not brought to trial on June 7, 1948 (Rec. p. 247). Obviously such biased, hostile and inflamed public sentiment against your petitioner did coerce the verdict of the jury in this case.

The jurisdiction of the Court is sustained by numerous cases decided by the Supreme Court of the United States, including **Powell v. State of Alabama**, 53 Sup. Ct. 55, 64 L. Ed. 158, 84 A. L. R. 527; **Patton v. U. S.**, 281 U. S. 276, 50 Sup. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263; **Avery v. State of Alabama**, 60 Sup. Ct. 321, 308 U. S. 444, 84 L. Ed. 377; **Patterson v. State of Alabama**, 55 Sup. Ct. 575, 294 U. S. 600, 79 L. Ed. 1082; **Norris v. State of Alabama**, 55 Sup. Ct. 579, 294 U. S. 587, 79 L. Ed. 1074.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition under "Statement of Matter Involved," which is hereby adopted and made a part of this brief.

SPECIFICATIONS OF ERROR.

1. The Supreme Court of Alabama erred in affirming a judgment of conviction in a capital case rendered as a product of a trial in which this petitioner was denied due process of law and equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States in that the trial was not conducted according to the due course of regular procedure provided by the law in the State of Alabama, this petitioner being denied the effective and substantial aid of counsel upon his arraignment.

2. The Supreme Court of Alabama erred in affirming a judgment of conviction in a capital case rendered as the product of a trial wherein this petitioner was denied due process of law and equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States in that he was forced to trial by his trial judge in an atmosphere of local public opinion known to exist by the trial judge, which was so hostile and prejudicial, biased and inflamed that your petitioner could not have had a fair, impartial and deliberate trial.

3. The Supreme Court of Alabama erred in holding that petitioner was given a fair, impartial and deliberate trial.

4. The Supreme Court of Alabama erred in holding that petitioner was not denied the right of counsel with the accustomed incidents of consultation and opportunity of preparation for trial.

POINT I.

The requirement of conforming to fundamental standards of procedures in criminal trials was made operative against the states by the Fourteenth Amendment to the Constitution of the United States.

Louie Young v. Coleman, 5 Fed. Sup. 702;

Chambers v. State of Fla., 60 Sup. Ct. 472, 309 U. S. 227, 84 L. Ed. 716;

Smith v. O'Grady, 61 Sup. Ct. 572, 312 U. S. 329, 85 L. Ed. 859.

POINT II.

The right of accused to assistance of counsel includes the right to assistance of counsel from time of arraignment until beginning of his trial, with consultation, thorough-going investigation and preparation are vitally important.

Powell v. State of Alabama, 53 Sup. Ct. 55, 64 L. Ed. 158, 84 A. L. R. 527;

Von Moltke v. Gillies, 332 U. S. 708, 68 Sup. Ct. 316.

POINT III.

Every reasonable presumption is indulged against a waiver of fundamental rights. To be a valid waiver of fundamental rights it must be understandingly and intelligently made.

Glasser v. U. S., 315 U. S. 60, 61, 62 Sup. Ct. 457, 86 L. Ed. 680.

POINT IV.

When a court or an officer of the court has knowledge requiring the exercise of a duty on accused's behalf, failure to exercise such duty constitutes a denial of due process of law.

Mooney v. Holohan, 294 U. S. 103, 55 Sup. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406;

Hall v. Johnson, Ninth Circuit, 91 Fed. (2d) 363;
Robinson v. Johnson, 50 Fed. Sup. 774, 776.

POINT V.

Arraignment is the first step in the trial of a criminal case.

Harmon v. State of Alabama, 62 So. 438, 8 Ala. App. 31;
Howard v. State of Alabama, 50 So. 954, 165 Ala. 18;
Presley v. State of Alabama, 113 So. 485, 22 Ala. App. 167;
Code of Alabama 1940, Title 15, Secs. 276-277;
Polk v. State of Oklahoma, 26 Okla. Crim. 283, 224 Pac. 194;
State v. Fowler, 59 Montana 346, 196 Pac. 992, 197 Pac. 487;
State v. Murphy, 68 Montana 427, 219 Pac. 629;
Robinson v. State, 178 Miss. 568, 173 So. 451;
State v. Cowan, 25 Wash. (2d) 341, 170 Pac. (2d) 653;
State v. Seafield, 129 Wash. 295, 224 Pac. 941.

POINT VI.

The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

Glasser v. U. S., 315 U. S. 60, 62 S. Ct. 457, 467, 86 L. Ed. 680;
Snider v. Massachusetts, 291 U. S. 97, 116, 54 S. Ct. 330, 336, 78 L. Ed. 674, 90 A. L. R. 575;
Tumey v. Ohio, 273 U. S. 510, 535, 41 S. Ct. 437, 445, 71 L. Ed. 749, 50 A. L. R. 1243;
Patton v. U. S., 281 U. S. 276, 292, 50 S. Ct. 253, 256, 74 L. Ed. 854, 70 A. L. R. 263.

ARGUMENT.

In support of the petition for a Writ of Certiorari in this cause the following argument is herewith submitted: The brevity with which the subject matter is treated is, we sincerely trust, in accordance with the practice in the Supreme Court of the United States. Such brevity should not be indicative of lack of confidence in the cause we represent, or a lack of faith in the substantial and fundamental question of widespread importance involved herein.

It is respectfully submitted that the petitioner, Lonnie James Ball, alias L. J. Ball, is an ignorant negro laborer with no knowledge of Court proceeding. Under the Statutes of the State of Alabama he was entitled to counsel upon his arraignment. At which time it was mandatory under the law of Alabama that he plead to the indictment charging him with a capital offense for which he was convicted.

> **Code of Alabama**, 1940, Title 15, Section 318, 1947, Cumulative Supp. to Vol. 4, appendix A; Title 15, Sections 278, 279, 276, 1940, **Code of Alabama**, Appendices B, C, and D.

Petitioner was brought into Court on the day of his arraignment, and he was without counsel to represent him, advise with him or do the things necessary and proper to his defense at this vital stage of his trial. The Trial Court designated a lawyer present in the courtroom to enter pleas in behalf of petitioner, which pleas were suggested by the court. Petitioner's rights and desires were completely ignored. The lawyer designated by the Court did not introduce himself to the petitioner, did not converse with petitioner, did not consult with petitioner, did not advise with petitioner, made no investigation whatsoever and even advised the Court that he could not represent petitioner.

Pleas were entered for petitioner. He had no understanding knowledge of the proceedings taking place. He had no voice in the proceeding taking place. Such a designation fell far short of meeting, in a proper sense, the requirement for appointment of counsel. The Circuit Court of Calhoun County is a Court of Record, no entry was made on such record of an appointment of counsel. For aught that appears in the record the trial Judge did not consider such casual designation an appointment at all. In the case of **Powell v. State of Alabama**, 53 Sup. Ct. 55, 287 U. S. 45, 77 L. Ed. 158, 84 A. L. R. 527, the Supreme Court of the United States, among other things, stated as follows:

> "In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against the defendants, that is to say from the time of their arraignment until the beginning of their trial when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

The Supreme Court of the United States has held in the case of **Hawk v. Olson**, 326 U. S. 276, 66 Sup. Ct. 116, 120, 90 L. Ed. 61, that denial of opportunity to consult with counsel on any material subject after indictment or similar charge violates the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of the United States in **Von Moltke v. Gillies**, 332 U. S. 708, 719, 68 Sup. Ct. 316, referred to its decision in **Powell v. State of Alabama**, 287 U. S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527, where the trial court, instead of appointing counsel particularly charged

with the specific duty of representing the defendants, appointed the entire local bar, and stated:

> "It is in this light that we view the appointment of counsel for petitioner when she was arraigned. This lawyer, apparently reluctant to accept the case at all, agreed to represent her only when promised by the judge that it would take only two or three minutes to perform his duty. And it seems to have taken no longer. Even though we assume that this attorney did the very best he could under the circumstances, we cannot accept this designation of counsel by the trial court as anything more than token obedience to his constitutionally required duty to appoint counsel for petitioner. Arraignment is too important a step in a criminal proceeding to give such wholly inadequate representation to one charged with a crime. The hollow compliance with the mandate of the Constitution at a stage so important as arraignment might be enough in itself to convince one like petitioner, who previously had never set foot in an American courtroom, that a waiver of this right to counsel was no great loss—just another legalistic formality. We are unable to agree with the government's argument that the momentary appointment of the lawyer for arraignment purposes supports the contention that the petitioner intelligently waived her right to counsel."

In the instant case petitioner was not given an opportunity to even make a purported waiver of his constitutional and statutory right to counsel to represent him upon the arraignment.

Prior to trial and upon arraignment an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and law involved, and then to offer his informed opinion as to what

plea should be entered. This duty cannot be discharged as though it was a mere procedural formality, for arraignment is too vital a stage in a criminal proceeding to give such wholly inadequate representation to one charged with crime as was given to accused in the instant case upon his arraignment. The designation of counsel made by the trial judge upon petitioner's arraignment was so wholly inadequate and ineffective as to constitute a denial of accused's right to counsel. This position is well supported by this Honorable Court's decisions in **Powell v. State of Alabama**, 287 U. S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527; **Von Moltke v. Gillies**, 332 U. S. 708, 68 Sup. Ct. 316, and other notable decisions of this Honorable Court, including the case of **Glasser v. U. S.**, 315 U. S. 60, 62 Sup. Ct. 457, 86 L. Ed. 680, wherein the Court, speaking through the late lamented Mr. Justice Murphy, stated as follows:

> "The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. Among those guarantees is the right granted by the Sixth Amendment to an accused in a criminal proceeding in a federal court 'to have the Assistance of Counsel for his defense.' 'This is one of the safeguards * * * deemed necessary to insure fundamental human rights of life and liberty' and a federal court cannot constitutionally deprive an accused whose life or liberty is at stake of the assistance of counsel. Johnson v. Zerbst, 304 U. S. 458, 462, 463, 58 S. Ct. 1019, 1022, 82 L. Ed. 1461. Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth

> Amendment, Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527, so are we clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired * * *"

The Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is contrary to the fundamental ideas of fairness and right. It is urged that in the instant case there was such a failure to make an effective appointment of counsel to represent your petitioner upon his arraignment as to vitiate the conviction and the judgment thereon is the product of a trial in contravention of the Fourteenth Amendment to the Constitution of the United Sates. Petitioner was grievously injured by this failure.

By statute enacted by the Legislature of the State of Alabama it is mandatory that objections going to the formation of the Grand Jury which presented the indictment must be made by plea in abatement before pleading "not guilty"—Title 15, Section 278, 1940 Code of Alabama, Appendix B; **Hale v. State of Alabama**, 10 Ala. App. 22, 64 So. 530. The plea in abatement raising objection to the formation of the Grand Jury comes too late after a plea of "not guilty." **Whitehead v. State of Alabama**, 206 Ala. 288, 90 So. 351; **Wimbush v. State of Alabama**, 237 Ala. 153, 186 So. 145; Title 15, Sec. 279, 1940 Code of Alabama, Appendix C.

Thus petitioner's substantial rights were probably waived as the result of the ineffective designation of counsel to represent him upon his arraignment. There can be no presumption of acquiescence of the loss of a fundamental right. **Ohio Bell Telephone Co. v. Public Utilities Commission**, 301 U. S. 292, 307, 57 Sup. Ct. 724, 731, 81 L. Ed. 1093. On the contrary "every reasonable presumption is in-

dulged against a waiver of fundamental rights such as the right of the accused to have the full and untrammeled assistance of counsel in the trial of a criminal case." **Glasser v. U. S.**, 315 U. S. 60, 61 (Head Note 8), 62 Sup. Ct. 457, 86 L. Ed. 680. Or the right of an accused charged with a capital offense to raise constitutional objections to the formation of the Grand Jury which returned the indictment charging him with a capital offense.

The Supreme Court of the United States in the case of **Powell v. State of Alabama**, 287 U. S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527, said:

> "However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial."

Had petitioner's counsel filed a plea in abatement upon the arraignment, prior to entering pleas of "not guilty" and "not guilty by reason of insanity," such a plea in abatement would have been sustained, or would have constituted error to a reversal of this cause. Calhoun County, according to the last official United States census, had a population of slightly more than twenty per cent colored persons, some twelve thousand nine hundred odd negroes and about fifty thousand two hundred seventy-five whites (Rec. p. 174). The Clerk of the Circuit Court of Calhoun County, Alabama, on the hearing of the motion for a new trial, testified that the Grand Jury which indicted petitioner was selected April 26, 1948 (Rec. p. 141), and that thirty persons were summoned to serve as Grand Jurors at the time petitioner was indicted, none of whom were negroes (Rec. p. 143). It was disclosed that there were two thousand five hundred names in the jury box (Rec. p. 185); that approximately one hundred twenty persons

were summoned each year to serve upon Grand Juries in Calhoun County and that around four to five hundred jurors were summoned for petit jury service each year (Rec. p. 155). It was further disclosed that only one negro had been called for Grand Jury Service and only one negro had been called for petit jury service during the five years next preceding the indictment of petitioner. One jury commissioner testified that the three or four hundred names he had placed in the box included the names of only five negroes and that there were no more than twenty-five names of negroes in the box (Rec. p. 186). The testimony of the other jury commissioners was substantially the same. The trial judge, upon hearing of the motion for a new trial, sustained the objection of the State to the production of the jury roll for Calhoun County.

The Fourteenth Amendment forbids any discrimination against a race in the selection of a jury. **Aiken v. State of Texas**, 325 U. S. 398, 65 Sup. Ct. 1276, 89 L. Ed. 1692; **Hill v. State of Texas**, 316 U. S. 404, 62 Sup. Ct. 1161, 86 L. Ed. 1559; **Patton v. State of Mississippi**, 322 U. S. 463, 68 Sup. Ct. 184.

In the **Aikin v. State of Texas** case, 325 U. S. 398, 65 Sup. Ct. 1276, 89 L. Ed. 1692, the Supreme Court said:

> "But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination 'in the selection of jurors on racial grounds.' "

In the case of **Norris v. State of Alabama**, 55 Sup. Ct. 579, 294 U. S. 587, 79 L. Ed. 1074, where the testimony disclosed that there was a total population of Jackson County of thirty-six thousand eight hundred eighty-one, of whom only two thousand six hundred eighty-eight were negroes, the Supreme Court of the United States held that the failure to call any negro for jury service over a long

period of time made out a prima facie case of denial of the equal protection of the laws which the Constitution guarantees.

The case of **Patton v. State of Mississippi**, 322 U. S. 463, 68 Sup. Ct. 184, presents a case where the State attempted to meet the prima facie evidence of racial discrimination by percentage calculations applied to a single jury. In that case the Supreme Court of the United States held that such practice was unwise. That purposeful and intentional discrimination was shown where the uncontradicted evidence disclosed that for thirty years or more no negro had served as a juror, though there was only a chance of one in four hundred that a negro would appear on a venire of one hundred jurors. It will not be presumed that so large a percentage of a population as represented by the negroes in Calhoun County, that is, twenty per cent of the population of Calhoun County, lacked sufficient qualifications for jury service as prescribed by the statute of the State of Alabama. Title 30, Section 21, 1947 Cumulative Supplement to Volume 6, Code of Alabama of 1940.

No motion for a change of venue was made by counsel designated by the trial court to "stand by" petitioner upon his arraignment or by the counsel designated by the trial judge less than one week prior to petitioner's trial before a petit jury to attend petitioner upon his trial. Article 1, Sections 6 and 75 of the Constitution of Alabama of 1901; Title 15, Sec. 267, 1940 Code of Alabama, Appendix E.

No motion for a continuance of the trial before a petit jury was made by either of said attorneys. Under Alabama law, where the local animosity is such that its natural tendency would be to intimidate or swerve the jury, or intimidate the court, a continuance of the trial should be granted. **Seay v. State of Alabama**, 207 Ala. 453;

16 C. J. 484, 453; 22 C. J. S., Criminal Law, paragraphs 482 and 497. One week prior to the trial of petitioner before the petit jury of Calhoun County, a judicial hearing was held in the court room of the Circuit Court of Calhoun County, presided over by petitioner's trial judge, wherein the State of Alabama was represented by the County Attorney for Calhoun County and the Circuit Court Solicitor for the State of Alabama. Attorneys not employed to represent petitioner, and not representing petitioner, requested a continuance of the trial. The judge denied the continuance requested because local animosity and feeling was so hostile, inflamed, prejudiced and biased against the accused that the people of Calhoun County, Alabama, would storm the jail were he not tried on June 7, 1948. The strong public sentiment against accused stated by the trial judge was concurred in by the County Attorney. When a court, or an officer of the court, has knowledge requiring the exercise of a duty on accused's behalf, failure to exercise such a duty constitutes a denial of due process of law. **Mooney v. Holohan,** 294 U. S. 103, 55 Sup. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406; **Hall v. Johnson,** Ninth Circuit, 91 Fed. (2d) 363; **Robinson v. Johnson,** 50 Fed. Sup. 774, 776.

We again reiterate the statement that petitioner's conviction was probably the result of his having been denied by the trial court the effective assistance of counsel to represent him upon his arraignment, in contravention of the Fourteenth Amendment to the Federal Constitution, and that his conviction was probably the result of his being denied due process of law by the trial court in forcing him to trial in a hostile, prejudiced and biased atmosphere probably sufficient to coerce the verdict of the jury sitting in trial of him. The effect of these denials of due process of law and the equal protection of the laws was to deprive petitioner of all procedural safeguards

which were his rights and which the trial court had the duty of protecting petitioner against any loss thereof.

Wherefore, it is submitted that this petition for certiorari to review the judgment of the Supreme Court of Alabama should be granted.

.....

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Of Birmingham, Alabama,
Counsel for Petitioner.

RODERICK BEDDOW,
G. ERNEST JONES, JR.,
Of Birmingham, Alabama,
Of Counsel for Petitioner.

APPENDIX A.

Title 15, Section 318, 1947 Cum. Supp. to Vol. Four, 1940 Code of Alabama:

"When counsel appointed for defendant in capital case.—When any person indicted for a capital offense is without counsel and the trial judge, after due investigation, is satisfied that the defendant is unable to employ counsel, the court must appoint counsel for him, not exceeding two, who must be allowed access to him, if confined, at all reasonable hours, and as compensation for said defense the attorney or attorneys so appointed shall be entitled in each case to a fee fixed by the judge presiding at said trial, which fee shall not be less than fifty ($50.00) dollars, nor more than one hundred ($100.00) dollars, to be paid on the warrant of the state comptroller from the general funds in the state treasury. Said presiding judge in the case shall certify to the comptroller that 'The attorney or attorneys appointed by the court in the case of Alabama v. ..... (name of defendant) has (or, have) performed the service required of him (or them) in representing the said defendant and that the fee therefor has been fixed in the sum of ..... dollars (designate amount of fee).' Whereupon a warrant shall be drawn in favor of the attorney or attorneys upon the general funds of the treasury of the state of Alabama in payment therefor (1943, p. 221, appvd. June 24, 1943, 1947, p. 61, appvd. July 23, 1947.)"

APPENDIX B.

Title 15, Section 278, Code of Alabama of 1940:

"Objections to indictments; how taken.—No objection to an indictment on any ground going to the formation of the grand jury which found the same can be taken to the indictment, except by plea in abatement to the indictment; and no objection can be taken to an indictment by plea in abatement except upon the ground that the grand jurors who found the indictment were not drawn by the officer designated by law to draw the same; and neither this objection, nor any other, can be taken to the formation of a special grand jury summoned by the direction of the court (1909, p. 305)."

APPENDIX C.

Title 15, Section 279, Code of Alabama of 1940:

"Plea in abatement; when filed.—Any plea in abatement to an indictment must be filed at the first session at which the indictment was found, if the accused has been arrested, or if the accused has not been arrested, such plea in abatement must be filed at the first session at which it is practicable after the defendant has been arrested and in all cases such plea in abatement must be filed before the plea to the merits."

APPENDIX D.

Title 15, Section 276, Code of Alabama of 1940:

"When prisoner stands mute, or refuses to plead.—If a defendant, when arraigned, refuses or neglects to plead, or stands mute, the court must cause the plea of not guilty to be entered for him."

APPENDIX E.

Title 15, Section 267, Code of Alabama of 1940:

"Change of venue; trial removed on defendant's application, etc.—Any person charged with an indictable offense may have his trial removed to another county, on making application to the court, setting forth specifically the reasons why he cannot have a fair and impartial trial in the county in which the indictment is found; which application must be sworn to by him, and must be made as early as practicable before the trial, or may be made after conviction, on new trial being granted. The refusal of such application may, after final judgment, be reviewed and revised on appeal, and the supreme court or court of appeals shall reverse and remand or render such judgment on said application, as it may deem right, without any presumption in favor of the judgment or ruling of the lower court on said application. If the defendant is in confinement, the application may be heard and determined without the personal presence of the defendant in court (1909, p. 212)."

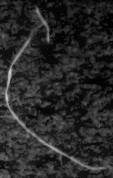
I, the undersigned, attorney of record in the matter of Lonnie James Ball, alias L. J. Ball, v. the State of Alabama, do hereby certify that I have served a copy of the above and foregoing petition and brief and argument in support thereof upon Hon. Albert A. Carmichael, Attorney General of the State of Alabama, and attorney of record in the above-styled cause for the State of Alabama, by mailing a copy thereof to him, addressed to him at his proper post office address, Judicial Building, Montgomery, Alabama, by United States Mail, with sufficient postage affixed to prepay all mailing charges.

This the .... day of ....., 1950.

.....

G. ERNEST JONES,

Counsel for Petitioner.



No. [redacted]

[redacted]

Petitioner

vs.

STATE OF ALABAMA,

Respondent

BRIEF AND ARGUMENT

IN OPPOSITION TO PETITION FOR

WRIT OF CERTIORARI

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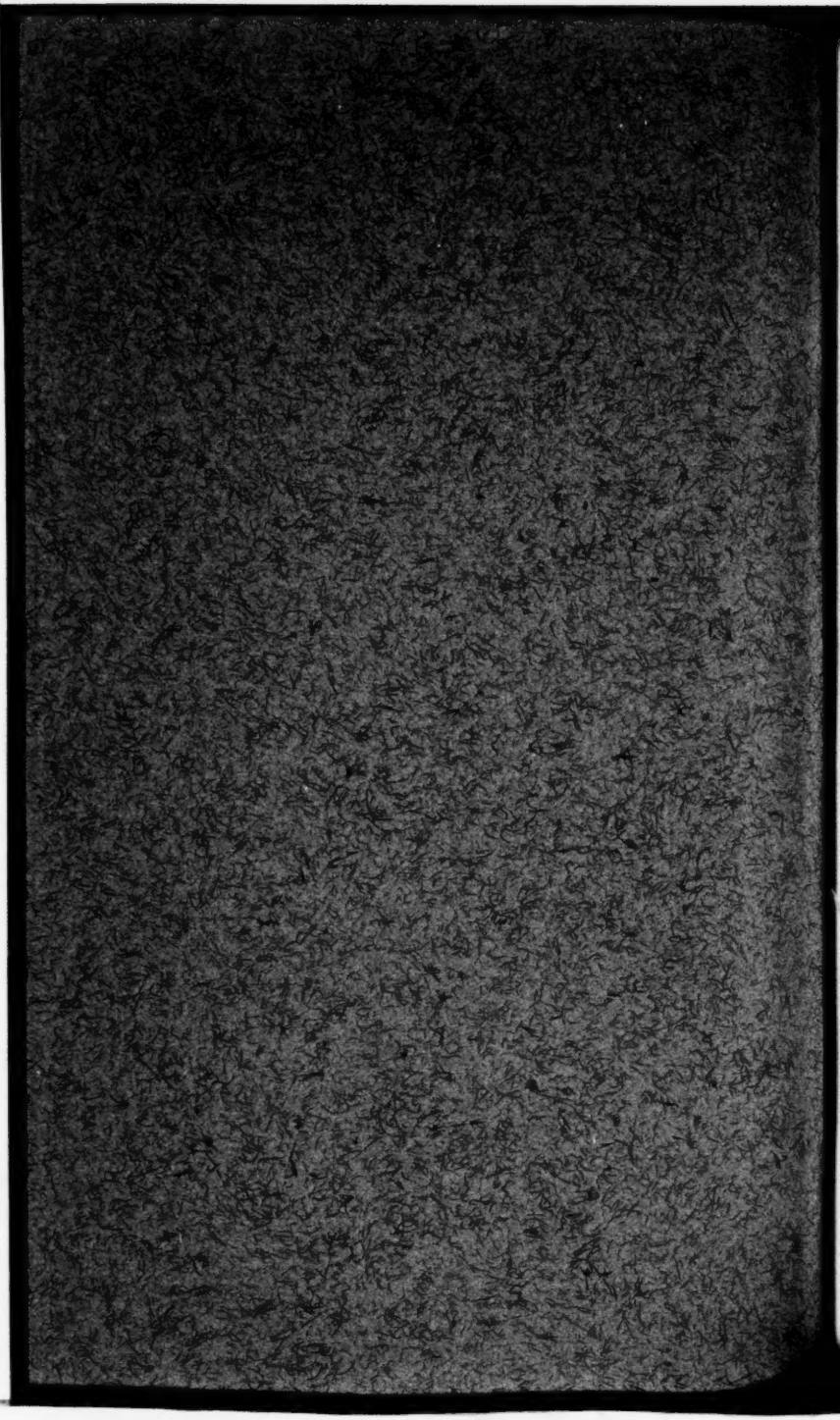

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

NO. .....

LONNIE JAMES BALL,
ALIAS, L. J. BALL,
Petitioner

VS.

STATE OF ALABAMA,
Respondent

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF AND ARGUMENT FOR RESPONDENT

I.

OPINIONS OF THE COURT BELOW

The opinion of the Supreme Court of Alabama is reported as follows:

Lonnie J. Ball, alias, v. State of Alabama, 7th Division 972, 42 So. 2d 626. An application for rehearing in the Supreme Court of Alabama was overruled without opinion. Ex parte Lonnie Ball, alias, 7th Division 972, November 17, 1949.

II.

JURISDICTION

This petitioner has applied for writ of certiorari from the Supreme Court of the United States to review the judgment of the Supreme Court of Alabama, rendered on June 30, 1949, rehearing denied November 17, 1949, under the provisions of Title 28, United States Code, Judiciary and Judicial Procedure, approved January 28, 1948; Section 1257(3), 28 U.S.C.A. Section 1257 (3). (Petitioner's brief pages 9 and 14.)

III.

ISSUES

Petitioner in his petition and brief seeks to raise some four questions for the determination of this Court. He would allege that he has been denied that due process of law guaranteed him by the Fourteenth Amendment to the Constitution of the United States in that:

(1) The trial of this petitioner was not conducted according to the due course of regular procedure provided by the law in the State of Alabama, this petitioner having been denied the effective and substantial aid of counsel upon his arraignment.

(2) Petitioner's trial was conducted in an atmosphere of local public opinion so hostile and prejudicial, biased and inflamed that petitioner could not be afforded a fair, impartial and deliberate trial, and such fact was known to petitioner's trial judge.

(3) The Supreme Court of Alabama erred in holding that petitioner was given a fair, impartial and deliberate trial.

(4) The Supreme Court of Alabama erred in holding that petitioner was not denied the right of counsel with the accustomed incidents of consultation and opportunity of preparation for trial.

The State of Alabama emphatically, categorically and explicitly denies the existence of any factual or legal basis for the above allegations.

IV.

STATEMENT OF THE CASE

This petitioner was tried and convicted in the Circuit Court of Calhoun County, Alabama, under an indictment charging him with the offense of murder in the first degree (R. p. 1). Upon conviction his punishment was fixed at death by electrocution (R. pp. 16, 17). Hence this case came to the Supreme Court of Alabama for review under the provisions of the Automatic Appeal Statutes of this State. Act No. 249, General Acts 1943, page 217; Title 15, Section 382(1) et seq., Code of Alabama 1940 (Pocket Part).

Insofar as the facts of this case are concerned, as they relate to the trial in main, we feel little could, or need be, added to those facts found set out in the opinion of the Supreme Court of Alabama rendered in this cause, which we understand is before this Honorable Court as a part of the record herein. As there indicated, the principal argument for reversal was then, and is now, directed to the refusal of the trial court to grant petitioner's amended motion for a new trial.

As regards the facts relating to the homicide itself, it is suffice to say that the uncontroverted facts disclose that upon May 7, 1948, this petitioner, Lonnie James Ball, shot and killed one Robert E. Sparks, the then Chief of

Police of Oxford, Alabama, and at the same time, and in the same affray, seriously wounded another officer by the name of Billingsley (R. pp. 29, 46, 47). The evidence indicates that the fatal shooting took place in the vicinity of a store operated by one R. C. Cobb, located in Oxford, Alabama. The testimony is to the effect that upon the late afternoon of May 7, 1948, this petitioner, in company with several other persons, arrived at Mr. Cobb's store where the automobile in which they were riding was halted near the air hose (R. pp. 19, 21); that this petitioner dismounted from the automobile and prepared to "air up" the tires of the automobile; that at this time, petitioner began cursing and berating the other members of his party (R. p. 22); that he was requested by Mr. Cobb to cease his cursing, and that he thereupon addressed vile remarks to Mr. Cobb concerning his disregard for the law (R. p. 22); that two members of petitioner's party, one man and one woman, dismounted from the automobile and attempted to place this petitioner back in the car; that petitioner struggled with these persons and disengaged himself from them, and that at about this time, a third party, one Fred Towns, appeared upon the scene and after wrestling with this petitioner managed to hold him until the deceased, Mr. Sparks, and officer Billingsley, who had been called by Mr. Cobb, arrived on the scene (R. p. 70); that these officers then took charge of petitioner and placed him in the rear seat of the automobile in which they were traveling (R. pp. 25, 26); that Mr. Sparks then returned to the group in front of the store, apparently to ascertain whether or not any other persons were involved in the difficulty, while officer Billingsley remained standing alongside the automobile in which petitioner was seated (R. p. 26); that at this moment, petitioner leaped from the automobile and seized officer Billingsley from the rear, and grasping officer Billingsley's pistol fired four bullets into the body of Mr. Sparks and a fifth bullet into the body of officer Billingsley (R. p. 27); that petitioner was then seized from the rear and disarmed, and was held a prisoner until

additional law enforcement officers arrived, whereupon petitioner was taken to the county jail by Mr. Hemphill Whiteside, the Mayor of Oxford, and another person. Mr. Sparks died shortly after the shooting, while officer Billingsley eventually recovered from his injury after long hospitalization (R. pp. 57, 58).

Petitioner's sole defense, insofar as the record indicates, was that he was so drunk he did not know what he was doing, and has no recollection of the events surrounding the tragedy (R. p. 89). In support of such allegation, petitioner sought to show by certain of his relatives and other members of his party that upon the day in question, after drinking some whiskey, the party went to the home of his brother, located some three or four miles below Oxford, where petitioner drank an unbelievable amount of home-brew, stated by petitioner and his witnesses to have been a gallon or more (R. pp. 78, 89). Petitioner further testifies that upon this particular day he has no recollection of events from sometime in the afternoon preceding the slaying until the next morning when he awoke to find himself in jail (R. p. 90). Such evidence was rebutted to a great extent by the testimony of Mr. Whiteside and other persons present as to the condition of this petitioner's sobriety (R. pp. 100, 109). It is the testimony of Mr. Whiteside that when he arrived upon the scene, almost immediately following the killing, this petitioner addressed him by name and insisted that he had not fired the fatal shots, and that petitioner likewise continued to talk with him while en route to jail, still calling him by name and discussing the slaying. This, in our judgment, disproves petitioner's story that he has no recollection of such events.

After his conviction, petitioner, through his counsel, made motion for new trial, which, after certain amendments and postponements, received a lengthy and detailed hearing, and was overruled by the trial court (R. p. 261).

Substantially the same statement of facts will be found set out in the opinion of the Supreme Court of Alabama rendered in this cause and that Court concluded that the evidence adduced presented a case for the determination of the jury, and no argument has yet been advanced to the contrary.

No question being raised as to the sufficiency of the oral instructions given the jury by the trial court or any point being made, or review sought, as to the refusal of any written requested instructions to this petitioner, and the Supreme Court of Alabama being fully persuaded that the verdict of the jury was not so decidedly contrary to the great weight of the evidence as to be wrong and unjust, said conviction was affirmed by a unanimous decision of said Court upon June 30, 1949. 42 So. 2d 626.

Turning next to those questions sought to be raised by this petitioner upon motion for new trial, we deem it well, in view of the oft-expressed opinion of this Court that in cases of this nature each must depend and decision therein turn upon the particular facts applicable thereto, that we set out in some detail the sequence of events leading up to and surrounding the indictment and trial of this petitioner. In this respect the record grows complex and prolific. In fact it is exceedingly difficult to separate the pertinent from the immaterial and to arrive at and determine the true questions presented. If this first be done, it is our contention that the issues presented for determination by this Court are considerably narrowed and not difficult of determination.

It appears from the record that upon motion for a new trial petitioner sought to raise numerous constitutional questions as to the procedure followed prior to and at the time of trial. In brief, petitioner insists that he was deprived of his constitutional guaranties under the Fourteenth Amendment to the Constitution of the United States. In support of such contention petitioner sought to raise numerous questions pertaining to his custody,

indictment, arraignment, trial, appointment of counsel and representation. These, we shall attempt to analyze and discuss, after first pointing out to this Court the facts pertinent thereto.

As we have previously noted, this offense was committed on May 7, 1948. The record indicates that upon May 21, the regular Grand Jury of Calhoun County, which Grand Jury had been organized and formed upon April 26, a date prior to the commission of this offense, indicted this petitioner for the offense of murder in the first degree (R. p. 1). The record further indicates that upon May 22, this petitioner was arraigned, and in answer to such indictment, entered a plea of not guilty and a special plea of not guilty by reason of insanity (R. p. 3). Said order of arraignment further shows that upon arraignment the petitioner was attended by counsel. The facts disclosed by the record conclusively and unequivocally show that upon June 1 (and not June 3rd as stated in brief of petitioner), the Honorable Hugh Walker was appointed to defend this petitioner, and that upon June 7 and 8, Mr. Walker did appear and defend this petitioner fully, intelligently and well, as so recognized and stated by the Supreme Court of Alabama in its opinion rendered herein. The record further indicates that at some undisclosed time, this petitioner procured the services of the law firm of Beddow and Jones of Birmingham, Alabama, and it is they who appeared for petitioner upon motion for new trial and who seek to raise all the numerous questions above mentioned. In this regard, we feel it proper to point out that the record likewise discloses that this particular law firm became interested in this case almost immediately after the perpetration of the crime.

In this regard, the record shows that as early as the 16th day of May, Mr. Beddow was in communication with the Circuit Solicitor requesting information as to a preliminary hearing for this petitioner and as to the date the Grand Jury was to meet (R. p. 250). The record

likewise discloses that members of this law firm came to Calhoun County and consulted with the family of petitioner (R. pp. 249, 250). It is likewise disclosed by the record that upon the morning of petitioner's arraignment, the now deceased trial judge, the Honorable Lamar Fields, himself called Mr. Beddow at his office in Birmingham seeking to ascertain whether or not the firm of Beddow and Jones had been employed to represent this petitioner (R. p. 251). Regarding this conversation, it is shown that the Judge was not definitely advised one way or the other, but was merely informed that this law firm was interested in the case and would perhaps appear and represent petitioner (R. pp. 147, 251). During the course of such telephone conversation, it is disclosed that the trial judge made inquiry of Mr. Beddow as to the pleas he would desire to enter upon behalf of petitioner and was informed that he would desire to enter a plea of not guilty and a special plea of not guilty by reason of insanity (R. pp. 140, 251). Absolutley no mention was made of the filing of any plea in abatement. The record at this point discloses that the trial judge then entered the courtroom and delegated Mr. Richard Emerson, a practicing attorney and City Attorney for the City of Anniston, to serve this petitioner as counsel upon arraignment and to enter such pleas for him (R. p. 140). This, Mr. Emerson did after first advising the trial judge that he could not appear and defend this petitioner upon trial. In addition to entering the pleas specified or suggested by Mr. Beddow, Mr. Emerson likewise requested of the court and was granted by the court a concession to the effect that such counsel as might appear for petitioner upon trial would be permitted to withdraw or file any additional pleas deemed necessary (R. p. 140).

The record likewise discloses that after telephone communications between the trial judge and the circuit solicitor, a conference was arranged between those officials and Mr. Beddow and Mr. Jones, to be held in Anniston upon the night of May 31, 1948 (R. p. 251). At this time, these parties, together with the county solicitor,

met in the City of Anniston and there discussed this particular case. We wish to here point out that at this time the law firm of Beddow and Jones had not accepted employment as petitioner's counsel and did not purport in any way to represent the petitioner, but that by their own statements they were merely investigating toward prospective acceptance of employment (R. p. 246). It it shown that in the course of this conference, Mr. Beddow and Mr. Jones informed the court that if he would grant unto them a continuance of at least two weeks, they might take the case. This, the trial court declined to do (R. p. 247). Such request in no sense rises to the dignity of a motion for continuance, and, in fact, at this stage of the proceedings, it would have been impossible for this particular law firm to have made such a motion inasmuch as they did not purport to represent the petitioner. (See opinion of the Supreme Court of Alabama).

In the course of the above-mentioned conference it is alleged that the county solicitor, Mr. Dormon, made a statement to the effect that a continuance should not be granted for the reason that if such continuance were granted, subsequent offenses of like nature might encourage violence. It is likewise alleged that the now deceased Judge Fields made a statement to the effect that if continuances were granted in this particular case the people of the county would march on the jail (R. p. 247). Zealous counsel for petitioner attach to such alleged statements dire and sinister motives and threats, contending that such statements show the existence of a hostile and violent attitude among the citizenry of Calhoun Couny and that mob violence was imminent. Such fears we deem ill conceived inasmuch as this record is completely barren of any testimony tending to show the existence of any such hostile atmosphere or threats of violence, and the undisputed fact is that at the time of the commission of this offense every consideration was shown this petitioner and there was absolutely no acts or threats of violence of any nature. Petitioner was never removed

from the county jail of Calhoun County and, insofar as this record indicates, no threats have ever been voiced, much less enacted, against him. Neither is there any indication that there was any necessity for additional safeguards of any nature, and indeed none were needed or required.

Following such conference and the refusal of the trial judge to grant this particular law firm additional time in which to prepare and perhaps accept employment in this case, it is shown that such firm declined to participate and, thereupon, upon the early morning of the succeeding day, June 1, 1948, the trial court delegated the Honorable Hugh Walker, likewise now deceased, the duty of defending this petitioner upon trial (R. pp. 247, 248). The record indicates that Mr. Walker consulted with petitioner, members of his family, procured witnesses and proceeded to trial some seven days later, June 7 and 8, 1948 (R. p. 157).

We consider it highly pertinent to here point out that Mr. Walker made no motion for a continuance and no motion for a change of venue, and unquestionably had such motions been made, they might properly have been overruled by the trial court. Mr. Walker did file a motion to quash the venire in this particular case, which motion is found set out upon pages 3-4 of the record, which motion by petitioner's present counsel's own admissions lacked all legal sufficiency, and was properly overruled. Likewise on motion for new trial, petitioner's present counsel sought to place in issue the alleged fact that this petitioner was held incommunicado in the jail of Calhoun County for a considerable length of time (R. pp. 203-213). On this particular point, the testimony of the Sheriff of Calhoun County is directly contradictory and states that, in fact, such did not occur (R. p. 235). Petitioner's present counsel likewise seeks to raise the new and novel question regarding the competency and legal ability of Mr. Walker, petitioner's appointed counsel at time of trial. In fact,

this seems to be the basis upon which all of petitioner's complaints rest.

We have somewhat laboriously and tediously set out all the facts pertaining to petitioner's incarceration, appointment of counsel for him, and all intervening matters associating the law firm of Beddow and Jones with this particular trial, and we feel that such is necessary for this Court to have a clear understanding of just exactly what transpired, and that once having attained such understanding, this Court will readily see the utter lack of merit in petitioner's contentions.

Here, as in our presentation of this case before the Supreme Court of Alabama, it becomes difficult to follow or understand petitioner's method of approach to this case. Admittedly, many of the questions which he seeks to now raise were not raised in the trial court. It seems to be his argument and contention that this was due to petitioner's inefficient representation therein and, apparently assuming this fact to have been established despite a total absence of facts supporting same, petitioner seeks to launch into a full exposition and seeks a full review upon those things "which might have been." As we view this particular case, the very essence thereof is the question of petitioner's representation in the trial court, and in this regard we earnestly insist that he was ably and well represented by mature, experienced and distinguished counsel, and had those matters and facts existed which petitioner now seeks to have us believe did exist, questions regarding same would have been there raised and determined. As we view this case, and as it was so considered by the Supreme Court of Alabama, petitioner herein seeks to bring this case within the principles enunciated by the Supreme Court of the United States in the case of *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527, and having so obviously failed to do so, by reason of the material differences therein in facts and applicable law, we submit that his other arguments and contentions must fall of their own weight and necessity.

V.

BRIEF AND ARGUMENT

1. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT REQUIRE THE SEVERAL STATES TO CONFORM THE PROCEDURE OF THEIR STATE CRIMINAL TRIALS TO THE PRECISE PROCEDURE OF THE FEDERAL COURTS, EVEN TO THE EXTENT THAT THE PROCEDURE OF THE FEDERAL COURTS IS PRESCRIBED BY THE FEDERAL CONSTITUTION.

Bute v. Illinois, 333 U. S. 640, 68 S. Ct. 763, 92 L. Ed. 986;

Herbert v. Louisiana, 272 U. S. 312, 47 S. Ct. 103, 71 L. Ed. 270;

Holden v. Hardy, 169 U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780;

Betts v. Brady, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595;

Palko v. Connecticut, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288;

Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158;

Foster et al v. Illinois, 332 U. S. 134, 67 S. Ct. 1716, 91 L. Ed. 1955,

Coates v. Lawrence, 46 Fed. Supp. 414, Aff. 131 Fed. 2d 110, cert. den. 63 S. Ct. 532, 318 U. S. 759, 87 L. Ed. 1132;

Bellman v. Burke, 74 Fed. Supp. 846, Aff. 170 Fed. 2d 413.

2. THE CONSTITUTION AND STATUTES OF THE STATE OF ALABAMA RECOGNIZE THE RIGHT OF AN INDIGENT DEFENDANT TO COUNSEL AND REQUIRE THAT IF A DEFENDANT IS INDICTED FOR A CAPITAL OFFENSE AND IS UNABLE TO EMPLOY COUNSEL THE COURT MUST APPOINT COUNSEL FOR HIM.

Article I, Section 6, Constitution of Alabama 1901;

Title 15, Section 318, Code of Alabama 1940;

Gilchrist v. State, 234 Ala. 73, 173 So. 651.

3. THE RIGHT OF AN ACCUSED TO THE ASSISTANCE OF COUNSEL GUARANTEED HIM BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES MEANS THAT THE ACCUSED IS ENTITLED TO THE GOOD FAITH ASSISTANCE OF A LAWYER IN DEFENDING THE ACCUSED AGAINST THE INDICTMENT UPON WHICH HE IS PUT TO TRIAL.

U. S. ex rel Feely v. Regan, 166 Fed. 2d 976;

Diggs v. Welch, 148 Fed. 667, 80 U. S. App. D. C. 5, cert. den. 65 S. Ct. 1576, 325 U. S. 889, 89 L. Ed. 2002;

Burton v. U. S., 151 Fed. 2d 17, 80 U. S. App. D. C. 17, cert. den. 66 S. Ct. 473, 326 U. S. 789, 90 L. Ed. 479;

Felton v. U. S., 170 Fed. 2d 153, 83 U. S. App. D. C. 277;

Conley v. Cox, 138 Fed. 2d 786;

Coates v. Lawrence, 46 Fed. Supp. 414, Aff. 131 Fed. 2d 110, cert. den. 63 S. Ct. 532, 318 U. S. 759, 87 L. Ed. 1132;

Mitchell v. Thompson, 56 Fed. Supp. 683;

Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158.

4. THIS PETITIONER WAS AFFORDED EFFECTIVE COUNSEL FOR HIS DEFENSE WITH ALL ACCUSTOMED INCIDENTS OF CONSULTATION AND OPPORTUNITY OF PREPARATION FOR TRIAL, WITH NO INFRINGEMENT UPON HIS CONSTITUTIONAL GUARANTIES UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Avery v. State of Alabama, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377;

Morris v. State, 198 Ala. 1, 68 So. 1003;

McAdams v. State, 216 Ala. 659, 114 So. 39;

Bankhead v. State, 33 Ala. App. 269, 32 So. 2d 814;

Peterson v. State, 231 Ala. 625, 166 So. 20;

Jarvis v. State, 220 Ala. 501, 126 So. 127.

5. UNDER THE LAWS OF THE STATE OF ALABAMA OBJECTIONS GOING TO THE FORMATION OF THE GRAND JURY WHICH PRESENTED THE DEFENDANT MUST BE MADE BY PLEA IN ABATEMENT BEFORE PLEADING NOT GUILTY, AND AFTER SO PLEADING, ANY SUCH OBJECTION IS ADDRESSED TO THE IRREVISABLE DISCRETION OF THE TRIAL COURT.

Vernon v. State, 239, Ala. 593, 196 So. 96;

Nixon v. State, 68 Ala. 535;

Jackson v. State, 74 Ala. 26;

Hubbard v. State, 72 Ala. 164;

Ball v. State, 42 So. 2d 626.

6. UNDER THE LAWS OF THE STATE OF ALABAMA OBJECTIONS GOING TO THE VENIRE OF THE PETIT JURY OR ANY MEMBER THEREOF MUST BE MADE BEFORE ENTERING UPON THE TRIAL OF THE CASE ON ITS MERITS UNDER DEFENDANT'S PLEA OF NOT GUILTY.

Peterson v. State, 227 Ala. 361, 150 So. 156;

Simpson v. Golden, 114 Ala. 336, 21 So. 990;

Hoskins v. Hight, 95 Ala. 284, 11 So. 253;

Barron v. Robinson et al, 98 Ala. 351, 13 So. 476

Fulwider v. Jacob, 221 Ala. 124, 127 So. 818.

7. THE CONSTITUTION AND STATUTES OF THE STATE OF ALABAMA DO NOT AUTHORIZE THE STATE TO APPLY FOR OR SECURE A CHANGE OF VENUE IN A CRIMINAL CASE, BUT SUCH MUST BE DONE ON APPLICATION, PETITION, OR MOTION OF THE DEFENDANT, OR WITH HIS CONSENT.

Article I, Sections 6 and 75, Constitution of Alabama 1901;

Title 15, Sections 267 and 268, Code of Alabama 1940;

Ex parte Lancaster v. State, 206 Ala. 60, 89 So. 721, 18 A.L.R. 706.

8. ONE ALLEGING DISCRIMINATION IN THE SELECTION OF A GRAND OR PETIT JURY ASSUMES THE BURDEN OF ESTABLISHING SUCH DISCRIMINATION.

Akins v. Texas, 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692;

Tarrance v. Florida, 188 U. S. 519, 23 S. Ct. 402, 47 L. Ed. 572;

Martin v. Texas, 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497;

Norris v. Alabama, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074.

VI

ARGUMENT

1. We make this observation in view of the seeming importance that petitioner attaches to the decisions of this Court rendered in the cases of *Glasser v. U. S.*, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680, and *Von Moltke v. Gillies*, 332 U. S. 708, 68 S. Ct. 316, 92 L. Ed. 309. The State of Alabama would contend that such cases are not here controlling in view of the fact that each of them deal with prosecutions within the Federal Court, as distinguished from trials within State courts, and each are controlled by the provisions of the Sixth Amendment to the Constitution of the United States rather than by the Fourteenth Amendment. As pointed out by this Court in the case of *Herbert v. Louisiana*, 272 U. S. 312, 47 S. Ct. 103, 71 L. Ed. 270:

> "The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this Court to revise the

decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'"

The Fourteenth Amendment does not say that no state shall deprive any person of liberty without following the "federal" process of law as prescribed for the federal courts in comparable federal cases. It says merely, "nor shall any State deprive any person of life, liberty or property without due process of law; * * * * *." This due process is not an equivalent for the process of the federal courts or for the process of any particular state. It has reference rather to a standard of process that may cover many varieties of processes that are expressive of differing combinations of historical or modern, local or other juridical standards, provided they do not conflict with the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Bute v. Illinois*, 333 U. S. 640, 68 S. Ct. 763, 92 L. Ed. 986.

This Court has decided after exhaustive consideration of the subject that the Fourteenth Amendment does not, through its due process clause or otherwise, have the effect of requiring the several states to conform the procedure of their state criminal trials to the precise procedure of the federal courts, even to the extent that the procedure of the federal courts is prescribed by the Federal Constitution or Bill of Rights. So here, the procedure followed by the State of Alabama in the trial of this cause should not be held to violate the standard of permissible process of law broadly recognized by the Fourteenth Amendment unless the Alabama procedure violates "the very essence of a scheme of ordered liberty" and its continuance would "violate a principle of justice

so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Bute v. Illinois*, supra; *Palko v. Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288; *Adamson v. California*, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903; *Betts v. Brady*, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595; *Brown v. Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682; *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158; *Herbert v. Louisiana*, supra; *Twining v. New Jersey*, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97; *Holden v. Hardy*, 169 U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780; *Hurtado v. California*, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232; *Foster v. Illinois*, 332 U. S. 134, 67 S. Ct. 1716, 91 L. Ed. 1955.

In view of the applicability to the state courts of the Fourteenth Amendment rather than the Sixth Amendment, the federal rules of practice, as stated in Rule 44 of the Federal Rules of Criminal Procedure, cannot be rearded as defining, even by analogy, the minimum requirement of due process for the states under the Fourteenth Amendment. This rule is evidence only of what this Court considers suitable in the federal courts and the states, in their discretion, may or may not follow it. The states are free to determine their own practice as to the assistance of counsel, subject only to the general limitation that such practice shall not deprive the accused of life, liberty or property without due process of law.

Again in the case of *Foster et al v. Illinois*, supra, this Court, after observing the inapplicability of the provisions of the Sixth Amendment to prosecutions in state courts, stated that the "due process of law" which the Fourteenth Amendment exacts from the states is a conception of fundamental justice. But process of law in order to be "due" only requires that a state give a defendant ample opportunity to meet an accusation.

In this case, the Justice preparing the opinion of the Court therein makes reference to the case of *Powell*

v. Alabama, supra, and states that in every case in which the doctrine of such case has been invoked and due process was found wanting, the prisoner sustained the burden of proving, or was prepared to prove but was denied opportunity, that for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement.

We, therefore, respectfully submit that the decisions in the cases of *Glasser v. U. S.*, supra, and *Von Moltke v. Gillies*, supra, should not be here controlling, inasmuch as they deal with the requirements of the Sixth Amendment, whereas we are here concerned with the "due process" requirement of the Fourteenth Amendment. Likewise, each of such cases differ materially from the instant case from a factual standpoint in that the decision in the *Glasser Case* apparently was founded upon the fact that the appointed counsel represented conflicting interest, and, therefore, could not devote his full attention, nor perform his full duty in the interest of the petitioner therein, Glasser, while the latter, the *Von Moltke Case*, concerns itself primarily with the waiver of counsel by the petitioner therein and entry of a plea of guilty to the charges against her. Neither of such propositions are questions of moment in the instant case. It is likewise of interest to note that in its final disposition of the *Von Moltke Case*, this Court remanded same to the District Court for a further hearing in order to determine whether or not there had been an intelligent waiver of counsel. Waiver is in no way involved in the case at bar, this petition having been afforded a full, fair and impartial trial upon the merits of the case.

2. The Constitution and statutes of the State of Alabama recognize the right of an indigent defendant to counsel and require that if a defendant is indicated for a capital offense and is unable to employ counsel, the Court must appoint counsel for him.

Article 1, Section 6 of the Constitution of Alabama 1901, provides, in part, that in all criminal prosecutions the accused has a right to be heard by himself and counsel, or either. Title 15, Section 318, Code of Alabama 1940, provides that:

> "If the defendant is idicted for a capital offense, and is unable to employ counsel, the court must appoint counsel for him, not exceeding two, who must be allowed access to him, if confined, at all reasonable hours."

These provisions of law only require that courts shall appoint counsel for a defendant who is indicted for a capital offense and who is himself unable to employ counsel. This has been the extent of the duty enjoined upon the trial courts of this State, with respect to appointment of attorneys for an indigent defendant, since the earliest history of the State. *Gilchrist v. State*, 234 Ala. 73, 173 So. 651. The validity of such constitutional provision and statute is not here attacked and we would respectfully submit that their requirements have been fulfilled in every respect. The Supreme Court of Alabama in its opinion rendered herein has specifically found there to have been no infringement of the rights accorded the defendant under these provisions and we respectfully submit that this should be strongly conclusive in this regard.

,3. Inasmuch as this petitioner strives to bring this particular case within the purview of those principles enunciated by this Court in the case of *Powell v. Alabama*, supra, we deem it well to here point out, as does the Supreme Court of Alabama in its opinion rendered herein, the material differences between this case and the *Powell Case*.

We would be the first to admit that the due process of law required by the Fourteenth Amendment, insofar as it relates to the effective assistance of counsel, is not

satisfied by an appointment amounting to no more than an "empty formality." However, we do earnestly and sincerely insist that the appointment herein does not fall within such category.

It would appear that petitioner seeks to attack as ineffective both his representation upon arraignment and his representation at trial, with particular emphasis on the former. In this regard, reference need again be made to the record in this case. Not wishing to unduly burden this brief with repetitious statements of fact, we wish in this regard to only point out that petitioner was afforded every opportunity to secure counsel of his own choosing. The record in this regard, as well as the opinion of the Supreme Court of Alabama, indicates that within nine days following the perpetration of this homicide, petitioner's family was in touch with the law firm of Beddow and Jones and engaging in consultation with them. This particular law firm is generally recognized throughout the State of Alabama for its ability and aggressiveness in the field of criminal law. Certainly this petitioner could have sought and obtained no better counsel. As the Supreme Court of Alabama states in its opinion, no stone was cast in the way of this law firm accepting employment in this case. Having made an investigation of this case, prior both to arraignment and trial, this law firm did decline to accept employment, presumably for the reason that they did not have time to prepare the case. This decision, however, was not announced until May 31, 1948, following arraignment of this petitioner upon May 22, 1948. It conclusively appears that even until the date of May 31, the trial court was still of the opinion that this particular law firm would participate in this case.

That such was the opinion of the trial court is conclusively shown by the fact that upon the morning of arraignment the trial judge, of his own volition, contacted the law firm of Beddow and Jones by telephone, advising them of the arraignment of this petitioner and inquiring

as to their desires to be present. Being informed that the employment of this particular law firm was only prospective at this time, the trial judge further inquired of Mr. Beddow as to the pleas he would care to enter herein if present and was informed that it would be his desire to enter the identical pleas which were entered, that is, a plea of not guilty and a special plea of not guilty by reason of insanity. No mention whatsoever was made of any plea in abatement, and indeed we must insist that such now comes as an abject afterthought of petitioner's able and resourceful counsel.

We wish to respectfully call the attention of this Court to the further fact that upon arraignment leave was granted this petitioner, by the court, to at any time thereafter withdraw or amend the pleas so entered and to substitute other and different pleas therefor. As we have pointed out, failure to enter pleas in abatement at time of arraignment does not constitute an absolute waiver of such right as petitioner would have us believe, but such pleas subsequently entered address themselves to the sound discretion of the trial court. We respectfully submit that in granting this concession to petitioner to subsequently enter such pleas as he might desire, the trial court exercised this discretion in favor of this petitioner and any failure to subsequently so enter such pleas cannot be attributed to arbitrary acts or conduct upon the part of the Court.

We, therefore, respectfully submit that rather than being deprived of the assistance of counsel upon arraignment, this petitioner was afforded the benefit of additional counsel by the leading law firm of the State of Alabama in the field of criminal law, and likewise the assistance of the trial judge himself who granted leave to petitioner to file any subsequent pleas so desired. All this was afforded this petitioner in addition to the assistance of Mr. Emerson, who was duly appointed and entered for this petitioner the pleas suggested by Mr.

Beddow. It is, therefore, our contention that any allegation that this petitioner was without the benefit and assistance of counsel upon arraignment is not factually sound and does not find support within this record.

Regarding the representation of this petitioner at time of trial, we respectfully submit that any allegation as to the inefficiency or incompetency of the attorney appointed for the defense of this petitioner is without foundation in fact. Such allegation is specifically rebutted by the Supreme Court of Alabama in its opinion herein and it is to be found from the record that the Honorable Hugh Walker, petitioner's appointed counsel, was an attorney of long standing and broad experience in the practice of the law and that upon the trial of this case he did his duty fully, intelligently and well.

It is well to here note that question having been made as to the appointment of Mr. Walker, in that such appointment does not appear upon the minutes of the Circuit Court of Calhoun County, we would respectfully submit that there is no requirement under the laws of this State that such appointment be so entered. The record irrefutably shows the appointment of this attorney upon the early morning of June 1, 1948, and this is sufficient.

In view of the fact that pointed accusations have been levelled at the ability and competency of the appointed counsel, we feel it well to here point out that in order to satisfy the due process of law requirements of the Fourteenth Amendment, as they pertain to assistance of counsel, it is only necessary that the accused be afforded the good faith assistance of a lawyer in defending against the indictment upon which he is put to trial. The Constitution in guaranteeing assistance of counsel does not guarantee assistance of the most brilliant counsel. *Mitchell v. Thompson* 56 Fed. Supp. 683. Neither does the Constitution guarantee that counsel appointed for or employed by an accused shall measure up to his own

standards of ability and competency, and it is enough if the trial court has appointed a qualified attorney to represent the accused and that attorney appeared, advised with and represented him. *Conley v. Cox*, 138 Fed. 2d 786.

Even assuming, as we do not, that certain mistakes were made in the conduct of the defense of this petitioner, we would point out that even under the more rigid requirements of the Sixth Amendment the constitutional rights of an accused are not deemed to have been impaired by counsel's "mistakes" subsequent to proper appointment. *Diggs v. Welch*, 148 Fed. 2d 667, 80 U. S. App. D. C. 5, cert. den. 65 S. Ct. 1576, 325 U. S. 889, 89 L. Ed. 2002. Certainly, it cannot be said that alleged "mistakes" of defense counsel relating to trial tactics might be held to constitute a denial of the assistance of counsel. *Felton v. U. S.* 170 Fed. 2d 153, 83 U. S. App. D. C. 277. See also *Coates v. Lawrence*, supra.

We, therefore, submit that this petitioner has been denied none of the rights guaranteed him by the Fourteenth Amendment, as they pertain to the assistance of counsel, in view of the fact that able and competent counsel was appointed, appeared and represented this petitioner fully and intelligently upon trial. Said appointment was far more than an "empty formality" as spoken of in the Powell Case, supra, and no analogy exists between the two cases.

4. Any allegation upon the part of this petitioner that the attorney appointed for his defense was not afforded all accustomed incidents of consultation and opportunity of preparation for trial, in our judgment, is completely refuted by the opinion of this court in the case of *Avery v. Alabama*, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377. In that case, this Court held to the effect that an accused put to trial three days following indictment and appointment of counsel was not deprived of any of his rights under the Fourteenth Amendment.

That case further points out that such is particularly true, and the fact that adequate time had been permitted for counsel to exhaust every angle of the case is illuminated, by the absence of any indication, on the motion and hearing for new trial, that they would have done more had additional time been granted. We deem this particularly appropos to this case, for as we interpret the insistences of petitioner's present counsel, they are to the effect that had adequate time been given them, they could have produced witnesses or documents pertaining to this petitioner's mental condition while in the service of the United States Army. It is interesting to note that even some months later on motion for new trial, such witnesses or documents had not been located or procured, and we would respectfully submit that petitioner's testimony as found set out on page 97 of the record conclusively shows that such witnesses or documents were not in existence. This testimony to us conclusively shows that had time ad infinitum been granted petitioner's counsel to seek to procure witnesses or documents as to mental ailments of this petitioner contracted while in the service, no such witnesses or documents would ever have been found, for the simple reason that they did not exist, and, therefore, it is small wonder that such did not appear on motion for new trial.

Lastly, and most important, it should be noted that no continuance was requested by petitioner's appointed counsel, and that the only mention found of continuance in this record is that to be found within the testimony concerning an informal conference between the officers of the court and the law firm of Beddow and Jones upon the evening of May 31, 1948, when this particular law firm was considering employment in this case. As pointed out by the Supreme Court of Alabama, such request did not rise to the dignity of a motion for a continuance in view of the simple fact that these lawyers did not purport to represent this petitioner, but were merely considering employment in the case. We sincerely believe this latter

fact, that no request for continuance was made by appointed counsel, completely refutes any allegation of want of time for preparation.

5. In this regard petitioner has failed to avail himself of the means and methods provided by law for attacking the organization and composition of the grand jury which returned the indictment against him. This must be done by plea in abatement before pleading not guilty, or at the very least prior to going to trial on the merits under such plea of not guilty. This was not done, despite the fact that the trial judge had specifically granted leave to this petitioner to file any other and different pleas he so desired from the time of arraignment to the time of trial. Certainly it cannot successfully be argued that such plea in abatement, attacking the organization and composition of the grand jury which returned this indictment on the ground that members of the colored race were systematically excluded therefrom, can be presented on motion for a new trial. No reported cases so hold and in all those cases cited by petitioner in his brief objections were timely and properly raised in the trial court. *Patton v. Mississippi*, 332 U. S. 463, 68 S. Ct. 184, 92 L. Ed. 76; *Hill v. Texas*, 316 U. S. 404, 62 S. Ct. 1161, 86 L. Ed. 1559.

6. We would here point out that under the laws of the State of Alabama objections going to the venire of the petit jury or any member thereof must be made before entering upon the trial of the case on its merits under the defendant's plea of not guilty, and failure to make such objection constitutes a waiver. *Peterson v. State*, 227 Ala. 361, 150 So. 156. There are, of course, certain exceptions as when the defense is misled by the false oath and fraud of a venireman and is thereby induced to accept such venireman on the jury.

The reason for such rule is that it is not permissible for a defendant who has not been so misled to participate in the selection of the jurors without objection, speculate

on winning a favorable verdict, and failing to do so raise such question on a motion for a new trial. Such rule is fundamental and sound.

Petitioner's objection here is that he was tried by an all-white petit jury. Certainly this fact was known to him when he entered upon trial and if he had any objection thereto he should have made such then known in the manner required by law. This he did not do, inasmuch as the purported motion to quash filed by petitioner lacked all legal sufficiency and was, by present counsel's own admission, properly stricken on motion by the state.

7. Here petitioner seeks to raise the proposition that a change of venue should have been granted him, alleging that he was tried in an atmosphere of hostility and prejudice, which affected his rights to a fair and impartial trial. Under the Constitution and laws of this State, the State cannot make a motion for a change of venue, such being a right attaching itself to the defendant. *Ex parte Lancaster v. State*, 206 Ala. 60, 89 So. 721, 18 A.L.R. 706. It should be here noted that in this case no motion for a change of venue was made. This is particularly significant in view of the fact that the attorney representing this petitioner upon trial was a long time resident of Calhoun County, having been engaged in the practice of law in the City of Anniston for more than forty years. Certainly if anyone was familiar with local atmosphere and prejudice, this attorney should have been; in fact, far more so than attorneys from a different city and county. The presumption must be that had this attorney of long experience and mature years, and likewise a long time resident of this particular community, felt a change of venue to have been warranted or advisable he would have requested same. *This he did not do.*

It is also of importance to note that this record is entirely barren of any factual support for the contention that such a motion should have been entered. Petitioner's present counsel attach vast significance to certain re-

marks allegedly made by the trial judge and county solicitor prior to the trial in an informal and highly personal conference between these officers and Mr. Beddow and Mr. Jones, but, as stated by the Supreme Court of Alabama, these remarks must be considered in the light of the surroundings and circumstances of their making. They were but the expression of personal opinions, not made in the presence of any juror or prospective juror, and in this regard could not have weighed upon the jury's verdict. Moreover, as pointed out by the Supreme Court of Alabama, so far as the record shows, these opinions were not supported by the facts in the case. The petitioner was incarcerated in the Calhoun County jail from the time he killed Sparks to the time of his trial. So far as this record shows, there were no special guards, officers, or state militia detailed to protect him either before or at the time of his trial. No demonstration or threats at any time are shown to have been made against the prisoner. No bias, prejudice or partiality is attributed to the trial judge in the trial of the cause, and none could be legitimately made on the basis of the record.

8. We have previously pointed out that objections going to the organization or composition of the grand jury and petit jury do not properly fall within the scope of motion for a new trial but should be raised prior to or at time of trial. Despite the fact that such was not here done, we will briefly point out that any such allegation as to systematic discrimination of any persons or races does not find support within the record.

As we have noted, the burden is upon one so alleging such discrimination to establish same. We are fully aware of the fact that this Court has held upon several occasions that where it is shown that for a long period of time the name of no person of the colored race has appeared upon the jury rolls or in the jury box, nor any such persons have in fact served upon either grand or petit juries of the county, a prima facie case of discrimination is made out. With this proposition we are in no

dispute. However, such is not the situation here confronting this Court. The testimony herein is to the effect that there were upon the jury rolls of Calhoun County, and in the jury box of that County, the names of colored persons. The testimony is likewise to the effect that such persons have been called for jury duty and have served upon the juries in and for that county. At best it can be said that the testimony, as it pertains to any systematic discrimination, is in direct conflict, petitioner alleging himself to have made out a prima facie case of discrimination and the testimony of those witnesses called by the State of Alabama refuting such allegation.

We, therefore, deem the opinion of this Court in the case of *Akins v. Texas*, 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692, to be particularly applicable to this case. Therein this Court stated.

> "As will presently appear, the transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of negroes on the grand jury. Therefore, the trier of facts who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect, Norris v. Alabama, 294 U. S. 587, 589-90; Smith v. Texas, 311 U. S. 128, 130, we accord in that examination great respect to the conclusions of the state juridicary, Pierre v. Louisiana, 306 U. S. 354, 358. That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evi-

dence that to give it effect would work that fundamental unfairness which is at war with due process,' Lisenba v. California, 314 U. S. 219, 238, or equal protection. Cf. Ashcraft v. Tennessee, 322 U. S. 143, 152, 153; Malinski v. New York, 324 U. S. 401, 404."

We feel it important to here point out that in those cases cited by petitioner in brief, that is, *Hill v. Texas*, 316 U. S. 404, 62 S. Ct. 1161, 86 L. Ed. 1559; *Patton v. Mississippi*, 332 U. S. 463, 68 S. Ct. 184, 92 L. Ed. 76, and *Norris v. Alabama*, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 784, the Court was confronted with a materially different situation as to facts and circumstances from that here prevailing, and in each of such cases objections were timely and properly raised in the trial court.

In the instant case, we would first insist that the objections came too late and certainly, even though they had been properly presented at time of trial, the facts adduced do not warrant sustaining such motions. Even though it be assumed, for the purpose of argument, that petitioner has succeeded in making out a prima facie case of discrimination, we submit that same has been fully rebutted by that testimony introduced upon behalf of the State, and that the conclusion of the trial judge is fully sustained by the evidence. See again *Akins v. Texas*, supra.

In conclusion, we would renew our insistences made earlier herein that the issues in this case are considerably more narrow in scope than the length of this brief, or the record in this proceeding, would indicate. The principal difficulty confronting this Court is to so narrow these issues, separating the pertinent from the non-pertinent matters sought to be raised by this petitioner. We would again insist that all objections pertaining to discrimination in the organization, selection, and composition of the grand and petit juries has not been timely raised. We would again point out that no motion for continuance

was made by appointed counsel nor was there any motion for a change of venue made by such counsel, hence we fail to see how these questions may now be properly considered.

It appears that in its essence, determination of this case hinges upon the question of whether or not this petitioner was afforded effective and competent counsel. In our humble judgment, the record itself is answer enough to this question. It is undisputed that counsel was appointed to defend this petitioner; that he consulted with and procured witnesses and conducted the trial of this petitioner in a highly efficient manner worthy of the highest commendation, and we respectfully submit that the Supreme Court of Alabama was completely correct in its statement, to-wit:

> "That upon the trial of the case lasting two days, he did his full duty, intelligently and well, and insofar as this record shows the results were for the lack of material on which to base a defense rather than the efforts of Mr. Walker. Avery v. State of Alabama, 237 Ala. 616, 60 S. Ct. 321, 308 U. S. 444, 84 L. Ed. 377."

Petitioner now seeks to present as a barrier to his conviction that intangible and oft-times indefinable element of our judicial procedure known as "due process of law." However, it can avail him nothing, for as so aptly stated by this Court in the case of *Adamson v. California*, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903, the purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction, and the conviction of this petitioner was fair, just, and fully warranted in every respect.

We, therefore, respectfully submit that the writ should be denied.

Respectfully submitted,

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CERTIFICATE

I hereby certify that I have forwarded a copy of the foregoing brief to Hon. G. Ernest Jones, Sr., Massey Building, Birmingham, Alabama, attorney for petitioner, on this the 17 day of March, 1950.

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